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Supreme Court, U.S.
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NO. 09-323

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2009

United States of America,
Respondent

vs

Thomas T. Scambos, Jr.,
Petitioner

On Petition For Writ of Certiorari
To the United State Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas T. Scambos, Jr.
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Dated: August 1, 2009

QUESTIONS PRESENTED

1. Should the production of papers, books, records, and testimony be compelled by the federal judiciary without any consideration for a citizen's Fifth Amendment Right to a protection from self-incrimination?

2. Do Magistrate judges have authority to issue and enforce Final Orders of the District Courts?

3. Is the Magistrate judge required to inform a *pro se* litigant of his or her rights within the I.R.S. Summons enforcement process?

4. Is "*appropriate process*" required for the District Court to hold jurisdiction to enforce a Summons issued by the Internal Revenue Service?

5. What establishes "*appropriate process*" if controlling statutes are not obeyed and applicable precedents are not followed?

LIST OF PARTIES

All parties are listed on the cover page

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OPINIONS BELOW

United States v. Thomas T. Scambos, Jr., (U.S. District Court for the Eastern District of Virginia), No. 3:07-MC-00011, and United States v. Thomas T. Scambos, Jr., Court of Appeals for the Fourth Circuit, 08-2102.

JURISDICTIONAL STATEMENT

This Petition for certiorari, filed pursuant to 28 U.S.C. § 1254(1), seeks review of the Fourth Circuit of Appeals Opinion in this case, filed on March 19th, 2009, reported as Case No. 08-2102.

STATUTORY PROVISIONS

This case involves the violations of the lower courts of the clear provisions of the statutes and the proper applicable precedents, providing for the "*appropriate process*" by which jurisdiction of the District Courts is legitimately established and preserved over the enforcement of an Internal Revenue Service Summons served on an individual citizen. This case also involves the Magistrate's erroneous reliance on the *United States v. Powell*, 379 U.S. 48 (1964) decision, as the applicable precedent under which to dispose of this dispute.

The statutory jurisdiction of the District Courts to enforce internal revenue Summons is identified in Title 26 U.S.C. Sections 7402(b) and 7604(a). Title 26 U.S.C. Section 7604(a) states:

> **§ 7604. Enforcement of summons**
>
> **(a) Jurisdiction of district court**
> If any person is summoned under the internal revenue laws to appear, to testify, or to produce

> books, papers, records, or other data, the United states district court for the district in which such person resides or is found **shall have jurisdiction by appropriate process** to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (emphasis added)

And Title 26 U.S.C. Section 7402(b) similarly states:

> **§ 7402. Jurisdiction of district courts**
>
> ....
>
> **(b) To enforce summons**
>
> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, **the district court** of the United States for the district in which such person resides or may be found **shall have jurisdiction by appropriate process** to compel such attendance, testimony, or production of books, papers, or other data.
>
> (emphasis added)

These statutes both make it absolutely clear that the jurisdiction of the District Court over the enforcement of an internal revenue Summons is only established by the accomplishment of the specified "***appropriate process***". Both of these statutes invoke the same requirement of "*appropriate process*", made necessary for the Court to hold jurisdiction.

That requirement of "*appropriate process*" cannot be accomplished unless all of the specific requirements of the controlling statutes regarding the issuance, service, and enforcement of a Summons are meticulously followed and obeyed by the United States, its agents and officers of the

I.R.S., and the Courts, throughout the Summons enforcement process.

The legal authority of Internal Revenue Service Agents, like the Agent in this case, to serve Internal Revenue Summons, is clearly specified and spelled out in Title 26 U.S.C. Section 7608 (a).

> **§ 7608. Authority of internal revenue enforcement officers.**
>
> **(a) Enforcement of subtitle E and other laws pertaining to liquor, tobacco, and firearms**
>
> Any **investigator, agent, or other internal revenue officer** by whatever term designated, whom the Secretary charges with the duty of **enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E** or of any other law of the United States **pertaining to the commodities subject to tax** under such subtitle for the enforcement of which the Secretary is responsible may –
>
> (1) carry firearms;
> (2) execute and serve search warrants and arrest warrants, and serve subpoenas and **summonses** issued under authority of the United States;
> ... (emphasis added)

This statute is clearly an authority for any IRS employee to serve a Summons in the pursuit of investigations being conducted **only under Subtitle E, "*pertaining to the commodities subject to tax*"**.

Conversely, we see in Title 26 U.S.C. Section 7608(b) that the **only** employee of the Internal Revenue Service who is authorized to serve a Summons in pursuit of an investigation **outside of Subtitle E**, which would include Subtitle A, which is the relevant subject of the instant dispute, is a "***criminal investigator of the Intelligence Division***".

> **§7608 Authority of internal revenue enforcement officers.**
>
> ...
>
> **(b) Enforcement of laws** relating to internal revenue **other than subtitle E**
>
> (1) Any **criminal investigator of the Intelligence Division** of the Internal Revenue Service whom the Secretary charges with the duty of enforcing any of the criminal provisions of the internal revenue laws, any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary is responsible, or any other law for which the Secretary has delegated investigatory authority to the Internal Revenue Service, **is**, in the performance of his duties, **authorized to perform the functions described in paragraph (2).**
>
> (2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are –
>
> (A) to execute and serve search warrants and arrest warrants, and **serve subpoenas and summonses** issued under authority of the United States;
>
> .... (emphasis added)

The **clear distinction in authorities under the (two) different subtitles,** established and granted by the two separate code sections **is undeniable**. Subsection (a), establishing the authority to investigate under Subtitle E states that "*Any ... agent, or other internal revenue officer* ***by whatever term designated***...".

Subsection (b), on the other hand, providing the authority **outside** of Subtitle E, only authorizes "*Any* ***criminal investigator of the Intelligence Division*** *of the Internal Revenue Service*", and does not include the "***by whatever term designated***" language, necessary to include other employees of the Service within the authority granted by this statute, as in Subsection (a).

This case involves the misuse of the statutes by an unauthorized IRS employee (agent), who is not a ***"criminal investigator of the Intelligence Division",*** who improperly issued and served a Subtitle A Summons, operating outside of her Subtitle E authority as an "agent", and therefore exceeded and violated the authority provided under Section 7608(a), supra, and also violated the specific requirements of the authority granted under Section 7608(b). For this reason, the "*appropriate process*" necessary for the District Court to hold jurisdiction over these matters to enforce the Summons never existed in this case.

Title 28 U.S.C. Section 636 provides the general authority of the Magistrate judges. Subsection (a) of that statute specifies:

> **§ 636. Jurisdiction, powers, and temporary assignment**
>
> **(a)** Each United States magistrate judge serving under this chapter shall have within the district in

which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;
(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
(4) the power to enter a sentence for a petty offense; and
(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

Noticeably lacking here under subsection (a), is any authority to act under Title 26, and none specifically established to enforce an IRS Summons issued under Subtitle A of Title 26. That authority comes only from the satisfaction of the "***appropriate process***" required under 26 U.S.C. §§ 7402(b) and 7604(a), supra.

Subsection (b) of this section, 28 U.S.C. § 636, further provides:

§ 636. Jurisdiction, powers, and temporary assignment

(b)

(1) Notwithstanding any provision of law to the contrary-

(A) a judge may **designate a magistrate judge to hear and determine any pretrial matter** pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. **A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.**

(B) a **judge may also designate a magistrate judge to conduct** hearings, **including evidentiary hearings**, and **to submit to a judge of the court proposed findings of fact and recommendations** for the disposition, by a judge of the court, **of any motion excepted in subparagraph (A)**, of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

> **(C)** the **magistrate judge shall file his proposed** findings and recommendations under subparagraph (B) **with the court and a copy shall forthwith be mailed to all parties**. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. ...
>
> (emphasis added)

Under subparagraph (b)(1)(B) of Sec. 636, the Magistrate is only authorized to conduct a preliminary evidentiary hearing, after which a report of proposed findings is to be prepared and submitted.

In this Petition for certiorari the Petitioner believes that material facts, applicable statutes, and appropriate court precedents have been ignored, and were erroneously discounted or disregarded by the lower courts. Additionally, the District and Appeals Court Opinions conflict with the well established line of applicable precedents controlling these matters.

STATEMENT OF THE CASE

This case is on appeal from a *Final Order* of the District Court upholding the actions of a Magistrate judge who improperly issued and enforced an *Order* of the Court without oversight by the District bench, as though he himself (the Magistrate) possessed the authority of the District Court to issue and enforce "Orders" as Final Orders of the District Court. Additionally, the Magistrate never provided the *pro se* Litigant with the required legal "*notice*" of his objection and appeal rights within the Summons enforcement process.

Eleven months after the Magistrate's *Order* **had already been enforced as a Final *Order*** of the District Court, the district court bench refused to address the identified jurisdictional issues raised in objection by Petitioner, refused to address the objection regarding the alleged improper invocation and reliance on an inappropriate precedent (*Powell*) by the Magistrate to improperly dispose of the dispute, **refused to address the fifth amendment rights issued raised in objection,** and abused the discretion of the court by altering the facts of the case as documented on the court's own docket sheet, in order to "*construe*" the Magistrate's enforced *Order* as a mere "*report and recommendation*", rather than as an *Order* of the District Court that had already been enforced, as shown on the Docket Sheet for the case, in order to "rubber stamp" and improperly uphold the Magistrate's unauthorized *Order* that had been issued at the preliminary hearing and that had already been wrongfully enforced by the Magistrate on the Petitioner without the Magistrate providing the *pro se* litigant any notice of his objection or appeal rights within the Summons enforcement process.

The Magistrate further erroneously relied on the *United States v. Powell*, 379 U.S. 48 (1964) decision as the only applicable precedent necessary to invoke to *Order* an individual citizen, the Petitioner in this case, to produce books and record for inspection by the government, and to provide testimony to the I.R.S. *Powell* was a corporate matter, and was not a dispute in which any 5th Amendment rights existed to be considered by the Court in its ruling. In this case, the Petitioner does possess 5th Amendment rights that should have been considered before the *Order* was issued by the Magistrate settling the dispute.

ARGUMENTS

Proper Line Of Applicable Precedents

In order to avoid addressing the legal issues raised in this dispute, the lower courts have invoked an erroneous line of precedents that conflicts with the long established and well known proper line of precedents applicable to this matter. The proper line of applicable precedent is simple and clear.

Internal Revenue Code **restricts the power to enforce a § 7602 summons to the district courts**. See I.R.C. §§ 7402(b), 7604(a); *United States v. Wisnowski*, 580 F.2d 149, 150 (5th Cir. 1978), reh. denied, 585 F.2d 521. A summons enforcement *Order* is a final dispositive and appealable order, *Reisman v. Caplin*, 375 U.S. 440, 449 (1964), **beyond the authority of a magistrate judge to issue**. *United States v. First Nat'l Bank*, 628 F.2d 871, 873 (5th Cir. 1980); *United States v. Wisnowski*, 580 F.2d 149 (5th Cir. 1978). Furthermore, **a district court may not permit,** and the parties may not consent to, **extension of the power of the Magistrate to enter final judgment in an area where such power is restricted to the district courts**. *United States Steelworkers of America, AFL-CIO v. Bishop*, 598 F.2d 408 (5th Cir. 1979). **The power to issue a *Final Order* is not granted to the Magistrate, and is in fact denied to the Magistrate** except under the very explicit circumstances specified under Title 7604(b) requiring the arrest of the summoned party.

Additionally, the district court Magistrate intentionally avoided and completely **failed the legal duty** to provide the *pro se* litigant with the **required *Notice*** of the *pro se*'s rights to object within 10 days to the Magistrate's decision, see *Wells v. Shriners Hospital*, 109 F.3d 198, 200-201 (4th Cir. 1997), and also failed to notify the *pro se*

litigant of the consequences of failing to do so (object), see *Wright v. Collins*, 766 F.2d 841, 846-847 (4th Cir. 1985).

All of these controlling precedents and authorities have been overlooked or ignored by both the District and Circuit courts in their *Orders* in this dispute, and this obvious conflict with the courts' true holdings in similar matters has not been addressed in their *Opinions*.

Statutory Construction

The language of code sub-sections 7608(a) and (b) is perfectly clear. They establish separate and distinct authorities for the issuance and service of Internal Revenue Service Summons under the two separate Subtitles of Title 26, A and E. In order to accommodate the convenience of the government, the lower courts have failed to hold the government to the law as written, and have extended to the Internal Revenue Service agent by implication, an authority that is not actually provided for, or granted in statute for the agent to exercise.

In examining the issues of statutory construction and the power of the Court to change the law from what is written to something deemed by the court to be more desirable than what Congress has provided, the Court has repeatedly been quite consistent in its holdings. In *United States v. Goldenberg*, 168 U.S. 95, the court held:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of the words and the rules of grammar"

In *Demarest v. Manspeaker*, 498 US 184, 112 L Ed 2d 608, 111 S Ct. 599, (1991), the court held:

> "In deciding a question of statutory construction, we begin of course with the language of the statute."

In *Connecticut National Bank v. Germain,* 503 US 249, p. 253-254, 117 L.Ed 2nd 91(1992), the court identifies that:

> " a court should always turn first to one cardinal canon before all others. We have stated time and again that **courts must presume that a legislature says in a statute what it means and means in a statute what it says** there. See, e.g., *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 -242 (1989); *United States v. Goldenberg,* 168 U.S. 95, 102 -103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68. When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); see also *Ron Pair Enterprises*, supra, at 241"

In *McNary v Haitian Refugee Center,* 498 US 479, 112 L Ed 2d 1005, 111 S Ct. 888, (1991), the court invokes these basic standards of statutory construction again:

> "In construing a federal statute, it is presumable that Congress legislates with knowledge of the United States Supreme Court's basic rules of statutory construction."

In *Reiter v Sonotone Corp.*, 442 US 330, 337, 60 L Ed 2d 931, 99 S Ct. 2326 (1979), the court again recognizes its duty to begin with the specific words of the statute:

> "As in all cases involving statutory construction, "our starting point must be the language employed by Congress,",

And again, in *Richards v United States*, 369 US 1, 9, 7 L Ed 2d 492, 82 S Ct. 585 (1962), the court indicates that:

> "we assume that the legislative purpose is expressed by the ordinary meaning of the words used."

In *Consumer Product Safety Comm'n v GTE Sylvania, Inc.*, 447 US 102, 108, 64 L Ed 2d 766, 100 S Ct. 2051 (1980), the court again recognizes:

> "...absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."

And in *Freytag v. Commissioner*, 501 US 115 L Ed 2d 764, pp. 767 – 973, the court simply states:

> "When the terms of a statute are unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."

In *Fuller v. United States* 615 F. Supp. 1054 (D.C. Cal 1985) , West's Key 188 quoting *Richards v. United States* 369 US 1, 9, 82 S. Ct. 585, 590, 7 L.Ed. 2d 492 (1962), the court expands on this point:

> "The starting point in any endeavor to construe a Statute is always the words of the Statute itself; unless Congress has clearly indicated that its intentions are contrary to the words it employed in the Statute, this is the ending point of interpretation."

This is echoed in *Estate of Cowart v. Nicklos Drilling Co.*, 505 US 120 L Ed 2d 379, 112 S Ct. 2589 (1992), the court wrote:

> "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning--in all but the most extraordinary circumstance--is finished; courts must give effect to the clear meaning of statutes as written."

And again in *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115, 25 L. Ed. 782, 783:

> "Words used in the statute are to be given their proper signification and effect."

And again in *Beecham v. United States*, 511 US 128 L Ed 2d 383 (1994):

> "The court's task is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning."

And in **recognition** of the **lack of judicial power to alter written law**, in *Federal Trade Com. v Simplicity Pattern Co.*, 360 US 55, p. 55

> "The United States Supreme Court cannot supply what Congress has studiously omitted in a statute."

And continuing, from *Product Safety Comm'n v. GTE Sylvania*, 447 US 102, 64 L Ed 2d 766, 100 S Ct. 2051 (1980), the court again, consistently holds:

"The starting point for interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."

In *United States v. Lexington Mill & E. Co.*, 232 US 399, pp. 409. (1914), the court reiterates:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

In *Busse v. Commissioner of Internal Revenue*, 479 F2d 1143, the court again is consistent in its recognition of both its own duty, and the limits of its own power to create effect with its rulings:

> "Courts have no power to rewrite legislative enactments to give effect to their ideas of policy and fitness or the desirability of symmetry in statutes."

And, in *CBS, Inc. v FCC*, 453 US 367, p. 367, 69 L Ed 2d 706, p. 709, the court commands:

> "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction, and such deference is particularly appropriate where an agency's

interpretation involves issues of considerable public controversy and Congress has not acted to correct any misperception of its statutory objectives."

In *Russello v United States*, 464 US 16, 23, 78 L Ed 2d 17, 104 S Ct. 296 (1983) (citation omitted), and *Keene Corp. v United States,* 508 US 124 L Ed 2d 118, 113 S Ct. (1993), the court recognizes that:

> "This fact only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

And in *American Tobacco Co. v Patterson,* 456 US 63, 71 L Ed 2d 748, 102 S Ct. 1534, the court again confirms it impropriety of adding to legislation, that which is not there.

> "It is not a function of the United States Supreme Court to sit as a super-legislature and create statutory distinctions where none were intended."

In *Ratzlaf v. United States,* 510 US 135, 126 L Ed 2d 615 (1994), the court declares that:

> "...courts do not resort to legislative history to cloud a statutory text that is clear"

In *Piper v. Chris-Craft Industries, Inc.*, 430 US 1, 26, 51 L Ed 2d 124, 97 S Ct. 926 (1977) the court declares:

> "Going behind the plain language of a statute in search of a possibly contrary congressional intent is "a step to be taken cautiously" even under the best of circumstances."

And in *United States v. Calamaro*, 354 U.S. 351, 1 L. Ed. 2d 1394, 77 S Ct 1138 (1957), the court held in response to the government's argument that regulations may serve as the sole founding source of authority for it's collection actions, that:

> "In construing federal revenue statute, Supreme Court gives no weight to Treasury regulation which attempts to add to statute something which is not there."

Subsequently, in *Water Quality Ass'n v. United States*, 795 F.2d 1303 (7th Cir. 1986), where, citing and quoting *Calamaro*, the court added at p. 1309:

> "**It is a basic principle of statutory construction that courts have no right first to determine the legislative intent of a statute and then, under the guise of its interpretation, proceed to either add words to or eliminate other words from the statute's language**. *DeSoto Securities Co. v. Commissioner*, 235 F.2d 409, 411 (7th Cir. 1956); see also 2A *Sutherland Statutory Construction* § 47.38 (4th ed. 1984). Similarly, **the Secretary has no power to change the language of the revenue statutes because he thinks Congress may have overlooked something**."
>
> (emphasis added)

In *Commonwealth Natural Resources, Inc. v. Commonwealth*, 219 Va. 529, 536, 248 S.E. 2d 791 (1978), at pg. 795, the court writes:

> "A cardinal rule of statutory construction is that a statute be construed from its four corners and not by singling out a particular word or phrase."

Petitioner simply argues that Section 7608, subsections (a) and (b), **should be applied by the courts as written**. The lower courts **inexplicably reject that truth**.

In *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53, 153 (1917), the court held:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, **the doubt must be resolved against the Government and in favor of the taxpayer"**. (emphasis added)

In *Hassett v. Welch.*, 303 US 303, pp. 314 - 315, 82 L Ed 858. (1938), the court again affirms the concept of a limited government, of clearly established powers, that if not specific and clear, should not be allowed to operate in favor of the government, to the disadvantage of the taxpayer:

> "In view of other settled rules of statutory construction, which teach that a law is - presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the construction of a taxing statute, **the doubt should be resolved in favor of the taxpayer**..."

And finally, in *Greyhound Corp. v. United States*, 495 F2d 863, the Court similarly commands,

> "Doubt relative to statutory construction **should be resolved in favor of the individual**, not the government"

It is the Petitioner's belief and legal argument, that the federal courts should simply apply Title 26 USC Section 7608 as it is actually written.

Jurisdiction By "*appropriate process*"

The jurisdiction of the district courts to enforce internal revenue Summons is established under Title 26 U.S.C. Sections 7402(b) and 7604(a). Both of these statutes provide that the ***"district court ... shall have jurisdiction by appropriate process"***. The requirement for "*appropriate process*" to be established under these sections, **in order for the district court to hold jurisdiction** over the enforcement of a Summons issued by an Internal Revenue Service employee, **is undeniable**.

Under Title 26 U.S.C. Section 7608(a), any Internal Revenue Service agent, like Agent Hunter in the instant dispute, is authorized to issue and serve a Summons, **but only** in regards to Subtitle **E** investigations **pertaining to commodities subject to tax**.

Under 7608(b), **only** "*criminal investigators of the intelligence division*" are authorized to issue and serve Summons **under Subtitle A**. In the instant dispute, Agent Hunter, who is **not** a "*criminal investigator*", improperly issued and served an **un**authorized Subtitle A Summons not related to the investigation of liability

derived from or relating to *commodities subject to tax* **under Subtitle E.**

The required "*appropriate process*" was violated by the Revenue Agent's misuse of statutory authority, who unlawfully issued and served a Subtitle A Summons that **she is not authorized in law to issue and serve**.

This improper misuse of the statutes by the agent, destroying the ***appropriate process*** **necessary for the district court to hold jurisdiction** over these matters, has been **overlooked,** or **has been erroneously ignored, in the *Orders* and *Opinions*** of this case.

Authority Of The Magistrate

The Magistrate himself invalidated the required "*appropriate process*" necessary for the District Court to hold jurisdiction, by usurping the authority of the District Court, and issuing a purportedly final ***Order*** to conclude the initial hearing (before the Magistrate) on Aug. 23, 2007. Again, rather than properly issuing a report and recommendation in the form of a "*proposed findings of fact and a proposed disposition*" as required under Title 28 Section 636(b)(1)(B) and (C), the magistrate instead issued an ***Order*** **of the District Court,** as shown on the docket sheet of the case, that he proceeded to enforce himself without further review by the district court before enforcement took place. By **exceeding his statutory authority** and **usurping the authority of the district court**, the Magistrate judge completely invalidated the "*appropriate process*" necessary, and required, for the Court to subsequently hold jurisdiction over the dispute. This fact has been overlooked and ignored by the lower courts.

The Magistrate himself further invalidated the "*appropriate process*" required for the District Court to subsequently hold jurisdiction over these matters to enforce the Magistrate's action, by failing to provide the *pro se* litigant with the **required *Notice*** of his rights to object within 10 days to the Magistrate's decision, see *Wells v. Shriners Hospital*, 109 F.3d 198, 200-201 (4th Cir. 1997), **and/or the consequences of failing to do so**, see *Wright v. Collins*, 766 F.2d 841, 846-847 (4th Cir. 1985). This requirement, laid on the courts, to give *Notice* of objection and appeal rights to pro se litigants, has long been recognized by the courts as part of the "*appropriate process*" necessary to the administration of justice when dealing with these issues in this type of dispute between an individual citizen and the government.

Providing *Notice* of these rights is a well known and long established essential part of the necessary "*appropriate process*" that is **required of the district court** magistrates **when dealing with *pro se* litigants** within IRS summons enforcement proceedings. Providing these *Notices* **was part of the necessary "*appropriate process*" required to be established in order for the district court to subsequently hold lawful jurisdiction** to uphold the actions of the Magistrate. These facts have been overlooked and ignored by the court.

Noticeably lacking under Title 28 U.S.C section 636 (a), granting the Magistrates authority and legal powers to act on behalf of the district courts, is any authority to act under Title 26, and none specifically established there to enforce an IRS Summons issued under Subtitle A of Title 26. The authority to enforce the Summons comes **only** from the establishment of the required "***appropriate process***", specified as necessary under Title 26 U.S.C. §§ 7402(b), 7604(a), and Title 28 U.S.C Section 636 (b).

The *Order* issued by the Magistrate on Aug. 23rd, **usurping the authority of the district court, and improperly ordering the Summons to be enforced on Petitioner without further court review,** done without giving any required *Notice* of appeal rights to the *pro se* litigant, was clearly issued improperly by the Magistrate, and **not lawfully** under the authority of 26 U.S.C. Sec. 7604(b). This again, further destroyed the required *"appropriate process"*, and should have been recognized by the lower courts as acting to subsequently remove jurisdiction over these matters from within reach of the district court bench. This fact has been overlooked or ignored by the court.

Powell As Erroneous Precedent

Additionally, *Powell v. United States*, 379 U.S. 48 (1964), was not the proper precedent for the Magistrate to adopt and apply to settle this dispute, because *Powell* is an inappropriate and improper decision to apply to the circumstances present in this action.

In *Powell*, the court did **not** consider, **BUT did not NEED to consider**, any Fifth Amendment rights of the party whose books and records were being compelled to be produced for inspection, **because it was a corporation,** *William Penn Laundry, Inc.* Since *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911), it has been consistently recognized by the courts that corporations **do not possess any 5th Amendment right** to a protection from self-incrimination.

Therefore, in *Powell* the court **properly ignored** the issue of the Fifth Amendment Rights against self incrimination, and properly **did not need** to take those Rights into consideration in taking its decision to compel the production of books and records and testimony, **because corporations don't possess a Fifth**

Amendment Right to any protection from self-incrimination, and this has been recognized by the courts as a legal fact **since that 1911 *Wilson v. United States* decision**.

However, in the instant matter, it is a **citizen's personal records** that were sought to be compelled for production, not a corporation's. Because this matter involves the compelled production of books and records of a citizen, not a corporation, **it was necessary for the Court to address and assess the impact, or potential impact, of that compelled production on the citizen's Fifth Amendment rights.** The Magistrate refused to even take these issues into consideration, and improperly avoided doing so by invoking the corporate *Powell* decision where those 5th Amendment rights were never considered, because they did not exist to be considered in that case.

In so doing, the Magistrate thereby effectively **circumvented all consideration** for the Petitioner's 4th and 5th Amendment rights in the instant matter, while also refusing to consider whether or not it was even possible that those rights would somehow be impacted or affected by the *Order* being issued.

By invoking the corporate *Powell* decision to decide this matter, the Magistrate **improperly neglected,** and **erroneously avoided** addressing and dealing with any of the issues impacting, or potentially impacting, the Fourth and Fifth Amendment rights of the Petitioner as a citizen (rather than a corporation as in *Powell*).

The Court should note that the issue is **not** whether 4th or 5th Amendment rights are, or would be, deemed by the Court to be superior to the government's interests in discovering tax liability, but simply whether or not the Court erred in ruling while **refusing** to even consider any

potential constitutional issues that might arise or be touched by the *Order*, and while refusing to assess the potential "*impact*" of the ruling and *Order* on those Amendments' rights of the Petitioner. Keeping in mind the fact that a 5th Amendment right did not exist to be considered in the *Powell* precedent invoked by the Magistrate, but which right does exist, and should have been recognized and assessed by the court in its decision in the instant dispute.

It is erroneous for the lower court to use that **corporate** precedent, where the corporation **did not possess** any Fifth Amendment rights to take into consideration, to compel the production of the books and records and the testimony **of an individual citizen**, like the Petitioner, under circumstances where his or her Fourth and Fifth Amendment rights do exist, are indeed applicable, and did indeed demand addressing and consideration for the impact to them by the events in process **before any ruling was made or Order was issued**. These facts and this *Wilson* decision have been overlooked or ignored by the lower courts in this case.

Instead of addressing and considering further the impact that the enforcement of the Summons might have on those constitutional rights of the Petitioner, the Magistrate declared he didn't understand the Petitioner's objections, but nevertheless, immediately ruled against Petitioner on the spot, ordering him to give up those constitutional rights or face pain of indeterminate imprisonment. For the Magistrate to rule while admitting that he did not understand the issues raised and presented, and without making or taking further consideration for the issues raised in objection concerning the constitutional rights of the Petitioner, was reversible error.

The government has averred from the beginning that the allegations being investigated are potentially criminal allegations that carry the possibility of criminal charges being filed against the Petitioner as a result of the testimony, information, books and records that the Petitioner has been forced to make and provide, and turn over to the Revenue Agent under the Magistrate's *Order*.

Fifth Amendment Rights Issues

Protection from compulsory testimony designed to implicate an individual in a crime, has been secured through the Fifth Amendment and **has been one of the most sacred principles known to American jurisprudence**. This principle of the Fifth Amendment protection from compulsory testimony, absent a grant of immunity, **has seen no erosion in its application since first expounded** and requires but few citations to support it; see *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906), *Blau v. United States*, 340 U.S. 159, 71 S.Ct. 223 (1950), and *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814 (1951).

The question of Fifth Amendment protection for the books, records and personal documents of a witness who may be implicated in a crime was first considered in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886), where the Supreme Court **expanded Fifth Amendment protection against compulsory testimony to include the production of books and records** of the witness. In granting such protection, the Court held that:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles

> of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom," *Boyd v. United States,* 116 U.S. 616, at 631-32 (1886).
>
> "And we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure -- and an unreasonable search and seizure -- within the meaning of the fourth amendment," *Boyd v. United States,* 116 U.S. 616, at 634-35 (1886).

Since the decision in *Boyd*, the Supreme Court has on some occasions limited the full import of that historic ruling. In *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911), the Court held that **the *Boyd* principle did not apply to corporations**; see also *United States v. Peter*, 479 F.2d 147 (6th Cir. 1973); and *In Re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983). **It is through this *Wilson* decision that *Powell* was decided on the basis of liability alone, without consideration for the Fifth Amendment rights of the summoned party** to a protection from self-incrimination, or the Fourth Amendment's guarantee of security for "*papers*".

Ultimately, what the Supreme Court has directed in matters of this nature, **is that an accused cannot be compelled to produce his own incriminating books and records** because such would involve to a degree an

amount of authentication of such books and records on the part of the accused; **such is tantamount to compelled testimony specifically proscribed by the Fifth Amendment.** In summary, what the Supreme Court has commanded is that if the government desires to obtain personal books and records and use the same against the accused, **it must be done through witnesses other than the accused himself.**

It was improper, ***inappropriate,*** and **erroneous** for the Magistrate to invoke *United States v. Powell*, a decision taken regarding the compelled production of the books and records of a **corporation that does not possess any Fifth Amendment rights**, and to apply and use that decision to effectively seize control of the Petitioner's **constitutionally *secured papers,*** and *Order* the production of his personal books and records, and to compel his testimony under circumstances that indeed **demanded** that the Fifth Amendment rights of the individual, and the impact or potential impact to them, be considered by the Court before making any ruling or issuing any *Order,* and subsequently ordering its enforcement **without further judicial review or appeal. These facts have been overlooked or ignored by the court in its rulings in this case.**

First National **As Erroneous Precedent**

The government argues that under *First Nat'l Bank of Atlanta*, 628 F.2d at 873, "*it is within the court's discretion to treat a magistrate's order as a proposed disposition where the magistrate entered a final judgment without authority*", **but that is not provided for in written law** and **directly contradicts the true line of applicable precedents as established and shown herein**. Because it is not explicitly provided for in the

actual written words and language of the statutes (see Title 28 U.S.C. Section 636), it thereby constitutes **only pure judicial legislation.** As regards judicial legislation, the Supreme Court has made it clear:

> "To hold that this can be done as matter of law we deem to be pure judicial legislation. We find **no warrant for it in the Constitution or in the powers conferred upon this court**. It is true the non action of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words." *DeLima v. Bidwell*, 182 US 1, pp.196-198, 45 L Ed 1041

Further, the cite and invocation of the *First Nat'l Bank of Atlanta* case by the government and the district court bench in this matter is inappropriate because of the dissimilarity of circumstances between that case and this one, and is therefore erroneously invoked in the instant matter. In that case (*First Nat'l*) the Magistrate's error was **DISCOVERED AND CORRECTED** by the district court bench within 10 days, **BEFORE ANY ENFORCEMENT** of the Magistrate's *Order* occurred, and before any production of books and records was compelled, and before any testimony was ordered to be made. Most importantly, and critically, **before any real damage had been done** by the Magistrate's error to the litigant's rights or case. **UNLIKE THE CIRCUMSTANCES IN THIS CASE**, where the unlawful nature of the Magistrate's *ORDER* was **not** discovered and corrected before enforcement occurred, **but nearly three months after** it was enforced by the Magistrate and Petitioner's testimony was compelled and his books and records were ordered by the Magistrate to be turned over to the government at the *Order*ed enforcement

appointment, under threat of pain of indeterminate imprisonment.

In the instant dispute now before the court, the controlling factual circumstances **are quite a different set** of circumstances than were present then in *First Nat'l*. In this dispute the district court **did not discover, and act to correct** the allegedly harmless error of the Magistrate **before enforcement** occurred and irreparable damage had been done, but nearly 3 months later. *First Nat'l Bank of Atlanta* is not an applicable authority because of the dissimilar circumstances within the two district court's bench's timing in acting to correct the Magistrates' errors. In *First Nat'l* the magistrate's error was discovered before enforcement occurred, and therefore that case is not relevant or properly applicable to the instant dispute, where discovery of the Magistrate's error did not occur until after enforcement had already been completed and irreparable damage to the Petitioner's rights was inflicted. This was a further violation of the statutorily required "*appropriate process*", necessary for the district court to possess in order to subsequently hold jurisdiction.

The legal record of **this** case is clear and well documented by the court's own records, which are inexplicably ignored within the district court's holdings. The face of the document issued August 23rd, 2007 by the Magistrate is itself styled as an *ORDER* of the District Court. The district court's own Docket Sheet for this case is irrefutable, and also shows an *Order* emanating from the Magistrate on August 23rd, 2007. It clearly shows the Magistrate issued an *Order* on August 23rd, not a "*recommendation*", or a "*report*", or even a "*proposed findings of fact and a proposed disposition*" **as required by law and necessary for "*appropriate process*" in**

order for the district court to subsequently hold jurisdiction to uphold the Magistrate's action.

By this act alone, of **usurping the authority of the district court** and himself issuing an unauthorized and therefore improper *Order,* instead of merely issuing a report and recommendation or "*proposed findings of fact and a proposed disposition*" as required by Title 28 Sec. 636(b)(1)(B) and (C), the Magistrate himself **invalidated the "*appropriate process*" required** for the District Court **to subsequently hold jurisdiction** to act further. **All** of these facts have been overlooked or ignored by the courts in their rulings.

SUMMARY AND CONCLUSION

Internal Revenue Code restricts the power to enforce a § 7602 summons to the district courts. See I.R.C. §§ 7402(b), 7604(a); *United States v. Wisnowski*, 580 F.2d 149, 150 (5th Cir. 1978), reh. denied, 585 F.2d 521. A summons enforcement *Order* is a final dispositive and appealable order, *Reisman v. Caplin,* 375 U.S. 440, 449 (1964), **beyond the authority of a magistrate judge to issue**. *United States v. First Nat'l Bank,* 628 F.2d 871, 873 (5th Cir. 1980); *United States v. Wisnowski*, 580 F.2d 149 (5th Cir. 1978). Furthermore, **a district court may not permit,** and the parties may not consent to, extension of the power of the Magistrate to enter final judgment in an area where such power is restricted to the district courts. *United States Steelworkers of America, AFL-CIO v. Bishop*, 598 F.2d 408 (5th Cir. 1979). All of these conflicting precedental holdings have been erroneously ignored by the lower and Circuit Court benches, and have not been addressed by the Circuit bench members in their *Opinion*.

Additionally, the district court Magistrates have a legal duty, that was failed in this case, to provide the *pro se*

litigant with the **required *Notice*** of the *pro se* litigant's rights to object within 10 days to the Magistrate's decision, see *Wells v. Shriners Hospital*, 109 F.3d 198, 200-201 (4th Cir. 1997), and to notify the *pro se* litigant of the consequences of failing to do so, see *Wright v. Collins*, 766 F.2d 841, 846-847 (4th Cir. 1985).

The improper and inappropriate actions engaged in by both the Revenue Agent, as identified under 26 U.S.C. § 7608 (a) and (b), in serving a Summons that she is not authorized by law to serve under Subtitle A, and of the Magistrate, in usurping the authority of the District Court by improperly issuing and himself enforcing an *Order* as a final *Order* of the District Court, without oversight or review by the district bench before enforcement of the *Order*, and without giving required notice of appeal rights to the *pro se* litigant, invalidated the subsequent jurisdiction of the District Court, which is dependent upon "*appropriate process*" required by law under §§ 7604(a) and 7402(b).

Without addressing and establishing jurisdiction through the ensured accomplishment of "*appropriate process*", the District Court had no lawful jurisdiction or authority to continue with proceedings and subsequently entertain objections to the Magistrate's action, or to issue any other Order upholding the Magistrate's ruling or actions.

Finally, the Magistrate has **erroneously** invoked and relied upon the *Powell v. United States* case as precedent to settle this matter. *Powell* was a decision involving the compelled production **of a corporation's books and records that did not constitute a citizens constitutionally "*secure*" "*papers*"** as in the instant matter. **Additionally, in that case** the Fifth Amendment right to the protection from self-incrimination was **properly not** considered by the Court, because **the right**

did not exist to be considered because corporations don't possess a Fifth Amendment right to a protection from self-incrimination (see *Wilson v. United States*, supra).

The Petitioner in the instant matter however, **a citizen, unlike the corporation in *Powell*, does possess a 5th Amendment constitutional right to a protection from compelled self-incrimination**, and his personal "*papers*" are "*secured*" under the **4th Amendment**, and the District Court inexplicably refused to address or even acknowledge the difference between the two sets of facts and circumstances in the two different cases, ignoring even its own invocation of the proper controlling precedents (recounted herein) made in its first *Order* of November 6th, 2007.

The Supreme Court has long held that:

> "There is **no such thing** in the theory of our national government **as unlimited power of taxation** in congress. **There are limitations**, as he justly observes, of its powers arising out of the essential nature of all free governments; **there are reservations of individual rights**, without which society could not exist, and which are respected by every government. **The right of taxation is subject to these limitations**. *Citizens' Savings Loan Ass'n v. Topeka*, 20 Wall. 655, and *Parkersburg v. Brown*, 106 U.S. 487, 1 Sup. Ct. 442." *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 599 (1895)

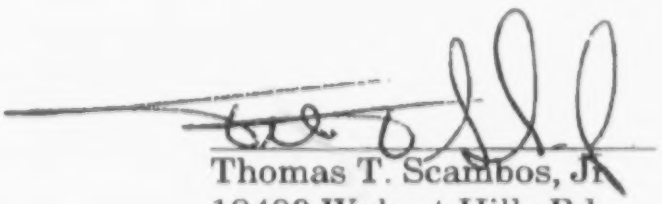
It would appear from the events that have transpired in the instant matter that the lower courts have lost sight of this constitutional reality. They appear to no longer believe in the rule of law, the proper invocation of

applicable precedent, or the constitutional philosophy providing for a representative government of limited, specifically enumerated powers that are written in law and that are not to be exceeded, abused, or misused by members of the government or its employees.

PRAYER FOR RELIEF

The foregoing considered, the Petitioner prays this Honorable Court will grant this Petition for Certiorari.

Respectfully submitted,



Thomas T. Scambos, Jr.
19400 Walnut Hills Rd.
Jeffersonton, VA 22724
Petitioner
(540) 937-3098

FILED: June 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2102
(3:07-mc-00011-nkm-bwc)

UNITED STATES OF AMERICA,
Petitioner -Appellee

v.

THOMAS T. SCAMBOS, JR.,
Respondent -Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Traxler, Judge King, and Judge Agee.

For the Court

/s/ Patricia S. Connor,

Clerk

FILED: March 19, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner -Appellee

v.

THOMAS T. SCAMBOS, JR.,

Respondent -Appellant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2102

UNITED STATES OF AMERICA,
Petitioner - Appellee,

v.

THOMAS T. SCAMBOS, JR.,
Respondent - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, District Judge. (3:07-mc-00011-nkm-bwe)

Submitted: March 17, 2009 Decided: March 19, 2009

Before TRAXLER, KING, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Thomas T. Scambos, Jr., Appellant Pro Se. Bruce R. Ellisen, Richard L. Parker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Thomas T. Scambos, Jr., appeals the district court's order accepting the recommendation of the magistrate judge and granting the Government's motion to enforce an Internal Revenue Service summons. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. United States v. Scambos, No. 3:07-mc-00011-nkm-bwe (W.D. Va. Aug. 19, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

United States of America
Petitioner,

v.

Thomas T. Scambos, Jr.
Respondent,

Civil Action No. 3:07mc00011

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Respondent's objections to the Magistrate Judge's Report and Recommendation and his Plea for Relief and Motion for Judgment on the Pleadings [Docket #24, #32, #35]. Respondent argues, among other things, that the Internal Revenue Service ("IRS") does not have jurisdiction to issue and enforce a summons on a United States citizen, that the federal income tax is an unlawful direct tax in violation of Article I of the Constitution, and that the Magistrate Judge misapplied *United States v. Powell,* 379 U.S. 48 (1964), in recommending to enforce an IRS summons against a U.S. citizen. Because Respondent's arguments are utterly frivolous and without legal merit, the Court will DENY his objections and motions and ADOPT the Report and Recommendation of the Magistrate Judge.

I. BACKGROUND

The United States filed this action on July 7, 2007, to enforce an IRS summons issued and served on Thomas T. Scambos, Jr. ("Scambos") on April 26, 2007. The Court

issued an Order to Show Cause why the summons should not be enforced on July 10, 2007, and scheduled a hearing on the matter for August 23.2007. The court referred the case to U.S. Magistrate Judge B. Waugh Crigler on July 31.2007, for disposition pursuant to 28 USC §636(b)(l)(A) The Court held the hearing to show cause on August 23, 2007, and ordered Scambos to comply with the summons pursuant to *United States v. Powell*, 379 US. 48, 57-58 (1964)[1]. At the hearing Scambos informed the Court that he would appear before the IRS as summonsed and that he would produce the requested documents, which he did on September 4, 2007.

Scambos filed a notice of appeal five weeks later on October 11, 2007, and submitted a memorandum in support on October 26, 2007, in which he again argued that the federal income tax is illegal and unconstitutional. The Court determined on November 9, 2007, that Judge Crigler did not have authority to enforce the IRS summons and construed Judge Crigler's order as a proposed findings of fact and recommended disposition.[2] Accordingly, the

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[1] Judge Crigler found that the United States had established a prima facie case for enforcement of the summons pursuant to the factors set forth in *United States v. Powell*, 379 U.S. 48, 57 58 (1964), and that Scambos had failed to rebut its prima facie case. Scambos did not address Powell during the hearing, but instead argued that the IRS did not have jurisdiction over him because he is a United States citizen, not a foreign person, and the federal income tax is only lawful as a tariff on foreign persons. Scambos also argued that the federal income tax is unlawful because it is an unconstitutional direct tax in violation of Article 1 of the Constitution, but otherwise did not discuss why the IRS summons should not be enforced.

[2] The Court did not have the authority to permit the magistrate judge to enter a final judgment in this matter because that power is restricted to the district court. See *US. Steelworkers of Am., AFL-CIO v. Bishop*, 598 F.2d 408,411 (5th Cir. 1979) (noting that the district court cannot confer jurisdiction to magistrate that is not permitted by statute). Thus, the Court shall construe the magistrate judge's order as the functional equivalent of a report and recommendation and review

Court ordered Scambos to file any objections he may have as to Judge Crigler's order in writing within ten days of receipt of the order.

Scambos filed written objections on November 19, 2007, but these objections simply restated his earlier arguments regarding the legality of the federal income tax laws. Scambos also filed a notice of appeal that day to appeal the Order entered on November 9,2007. Scambos later filed a motion to stay the proceedings pursuant to Federal Rule of Civil Procedure 62(c) on November 26, 2007. The Court subsequently denied the motion to stay on January 8, 2008, because a final judgment had not yet been entered. Scambos filed another objection to Judge Crigler's Order on January 22,2008, and argued that Judge Crigler violated his rights under the Fifth Amendment and improperly applied *Powell,* which he believes to apply only in the case of corporations. The United States Court of Appeals for the Fourth Circuit subsequently denied Scambos's appeal on April 21, 2008, and issued its final mandate on June 13,2008. Scambos filed a Plea for Relief on July 25,2008, in which he again argued that Judge Crigler improperly applied *Powell.* Scambos asks the Court to order the IRS to return all of his papers, books, and records that were turned over to them on September 2,

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the order *de novo* now taking into consideration any objections filed by the parties. *United States v. First Nat'l Bank,* 628 F.2d 871, 873 (5th Cir. 1980) (holding that it is within the court's discretion to construe a magistrate's order as a proposed disposition where the magistrate entered a final judgment without authority); see also *United States v. Mueller,* 930 F.2d 10, 12 (8th Cir. 1991) (holding that magistrate judge's order to enforce IRS summons was the functional equivalent of a report and recommendation because the district court conducted *de novo*

review based on the parties' written objections); 14-72 James Wm. Moore et al., Moore's Federal Practice § 72.08 (3d ed. 1999) ("If a magistrate judge erroneously enters an order purporting to determine a dispositive matter, a district judge reviewing the order may ignore the form of the decision and treat it as a recommendation.").

2007, and argues that these materials should be considered fruit of the poisonous tree because of the wrongful enforcement of the IRS summons.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 72 permits a party to submit objections to a magistrate's ruling to the district court within ten days of the order. Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b). The district court conducts a *de novo* review of those portions of the magistrate's report and recommendation to which specific objections were made. Fed. R. Civ. P. 72(b)(3); *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982). Those portions of the Magistrate's report and recommendation to which no objection are made will be upheld unless they are clearly erroneous or contrary to law. *See Webb v. Calfano*, 468 F. Supp. 825,830 (ED. Cal. 1979). The district court may accept, reject, or modify the recommended disposition based on its *de* novo review of the recommendation and the objections made. Fed. R. Civ. P. 72(b)(3).

III. DISCUSSION

First, Scambos argues that the United States Congress and the Internal Revenue Service lack the constitutional authority to impose an income tax because it is a "direct" tax that has not been apportioned among the several States of the Union in violation of Article I, Section 9, clause 4 of the United States Constitution. *See* U.S. CONST. art. I, § 9, cl. 4. This argument has been repeatedly held to be frivolous and "devoid of any arguable basis in law."[3] *See*, e.g., *United States* v. *Collins*, 920 F.2d

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[3] The United States Court of Appeals for the Second Circuit discussed in depth this very argument before finding it indisputable that

619, 629 (10th Cir. 1990) (noting that argument that the

Congress has the constitutional authority to impose an income tax: We first address ourselves to the appellant's contention that neither the United States Congress nor the United States Tax Court possess the constitutional authority to impose on him an income tax for the taxable year 1980. Appellant argues that an income tax is a "direct" tax and that Congress does not possess the constitutional authority to impose a "direct" tax on him, since such a tax has not been apportioned among the several States of the Union. In support of his argument, appellant cites Article I, Section 9, clause 4 of the United States Constitution which provides that: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." He also relies on the case of *Pollock v. Farmer's* Loan *and Trust* Co., *157* U.S. 429, 15 S.Ct. 673, 39 L. Ed. 759 (initial decision), 158 U.S. 601, 15 S.Ct. 912, 39 L. Ed. 1108 (decision on rehearing) (1895), wherein the United States Supreme Court held that a tax upon income from real and personal property is invalid in the absence of apportionment. In making his argument that Congress lacks constitutional authority to impose a tax on wages without apportionment among the States, the appellant has chosen to ignore the precise holding of the Court in Pollock, as well as the development of constitutional law in this area over the last ninety years. While ruling that a tax upon income from real and personal property is invalid in the absence of apportionment, the Supreme Court explicitly stated that taxes on income from one's employment are not direct taxes and are not subject to the necessity of apportionment. *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. at 635, 15 S.Ct. at 919. Furthermore, the Sixteenth Amendment to the United States Constitution enacted in 1913, provides that:

"The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the Several States, and without regard to any census or enumeration,"

Finally, in the case of *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L. Ed. 666 (1937), the Supreme Court in effect overruled Pollock, and in so doing rendered the 16th Amendment unnecessary, when it sustained New York's income tax on income derived from real property in New Jersey. Id at 314-315, 57 S.Ct at 468-69. Hence, there is no question but that Congress has the constitutional authority to impose an income tax upon the appellant.

Ficalora v. Commissioner, 751 F.2d 85, 87 (2d Cir. 1984); see also *Charczuk v. Commissioner*, 771 F.2d 471, 472-73 (10th Cir. 1985) (quoting *Ficalora*, 751 F.2d at 87).

Sixteenth Amendment does not authorize a direct, non-apportioned tax on U.S. citizens is "patently absurd" and "devoid of any arguable basis in law"). Moreover, this argument ignores the fact that the 16th Amendment modified the Constitution in Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4. to remove certain restrictions on Congress's taxation power. See, e.g., *United States v. Stillhammer*, 706 F.2d 1072, 1077 (l0th Cir. 1983) ("[T]he [Sixteenth]Amendment granted no new power to Congress, but merely freed it to exercise the taxing power granted in Article I, Section 8, in taxing income without the restriction of apportioning the tax among the states, and without regard to any census or enumeration, a condition placed on direct taxes by Article I, Section9."). As a result, "the debate over whether the income tax is an excise tax or a direct tax is irrelevant to the obligation of citizens to pay taxes and file returns." *United States v. Melton,* 86 F.3d 1153, 1996 WL 271468, at *2 (4th Cir. 1996) (unpublished).

Second, it is well settled that all U.S. citizens are required to pay federal income taxes. *See,* e.g., *Lovell* v. *United States,* 755 F.2d 517, 519 (7th Cir. 1984) ("All individuals, natural or unnatural, must pay federal income tax on their wages . . . ."); *see also United States v. Updegrave,* No. 95-CV-6054, 1997 WL 297074, at *6 n. 10 (E.D. Pa. May 28, 1997) ("[C]ontrary to defendant's claims, citizens and residents of the United States must pay federal income taxes regardless of whether they receive benefits from the United States government."). Scambos spends much of his briefs arguing that the federal income tax is unlawful other than as a tariff on foreign income or citizens because of the Supreme Court's opening statement in *Brushaber* v. *Union Pac. R.R.* Co., 240 U.S. 1, 9 (1916), which states, "[T]he appellant filed his bill to enjoin the corporation from complying with the income tax provisions of the tariff act of October 3, 1913." Scambos asserts that this statement by the Supreme Court identified the income tax laws to be part

of a tariff act, and a tariff, by definition, is an act imposing a tax on foreign imports or activity, not domestic activity. This argument is unquestionably spurious and it strains credulity to think that even Scambos believes such an assertion. The Revenue Act of 1913, 38 Stat. 114, also known as the Tariff Act or the Underwood Tariff, both lowered tariff rates on specific imported products *and* reimposed the federal income tax. *See* Revenue Act of 1913, ch. 16, sec. 11, 38 Stat. 114, 166 (1913) ("[T]here shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad . . . a tax of 1 per centum per annum upon such income .. . ."). Further, the Supreme Court did not discuss or reference any tariffs in B*rubasher,* but instead held that the income tax provision of the Revenue Act was not unconstitutional. *Brubasher,* 240 US. at 18-20 (holding that the Sixteenth Amendment did not bestow taxing power, but merely eliminated the requirement that the income tax be apportioned among the state). Regardless, the Revenue Act of 1913 has long since been amended; thus, it is utterly irrelevant as to the name or the provisions within the Revenue Act given that Brubasher simply recognized the long held right of Congress to enact a federal income tax, not the right to enact that specific income tax. Brubasher, 240 U.S. at 17-1 8 (noting that the Sixteenth Amendment did not confer power to levy income taxes because Congress already possessed this power before the Amendment was enacted). In the end, Scambos's argument that the federal income tax applies only to foreign persons or corporations is based on a misreading of the statutes, regulations, and case law that relies on semantics and a lack of context to arrive at his predetermined conclusion, a conclusion that just happens to coincide with his own self-interest. Because Scambos has asserted only frivolous arguments devoid of any legal merit, the Court will deny any and all objections regarding the constitutionality or legality of the federal income tax laws and whether he is

subject to their jurisdiction. Third, the United States has satisfied the four elements required to establish a prima facie showing of good faith in order to enforce the IRS summons[4]: (1) that the investigation is being conducted for a proper purpose; (2) that the inquiry may be relevant to that purpose; (3) that the information sought is not already in the possession of the IRS; and (4) that the administrative steps required by the Internal Revenue Code have been followed[5].

United States v. Powell, 379 U.S. 48, 57-58 (1964); *Conner v. United States*, 434 F.3d 676, 680 (4th Cir. 2006). The government bears only a slight or minimal burden to make its prima facie case. Connor, 434 F.3d at 680. Once it has established a prima facie case in favor of enforcement, the burden shifts to the taxpayer to disprove any element or to show that judicial enforcement of the summons would constitute an abuse of the court's process. Id. The taxpayer bears a heavy burden in rebutting the prima facie case and the Court will enforce the summons unless the taxpayer is able to satisfy this heavy burden. *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444-45 (10th Cir. 1985).

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[4] The IRS is authorized to summons "any books, papers, records, or other data which may be relevant or material" to an IRS investigation. 26 U.S.C. 5 7602(a) (emphasis added).

[5] Scambos has argued that Powell applies only in the context of corporations and not to individual taxpayers, but this argument clearly is without merit. *See Ryan v. United States*, 379 U.S. 6 1, 62 (1964) (affirming enforcement of IRS summons of individual taxpayer "for the reasons given in *United States v. Powell*"); *United Slam v. McHeny*, *552* F. Supp. 2d 571, *576* (E.D. Va. 2008) (enforcing IRS petition of individual taxpayer); *see* also *Parks v. FDIC*, 65 F.3d 207, 216 (1st Cir. 1995) (Selya, J., dissenting) ("Though Powell itself dealt with a corporate taxpayer, it is transpicuously clear that the Powell standard applies to the production of private financial papers and records of individuals . . . .").

Here, the IRS issued the summons for a proper purpose because it is investigating whether Scambos violated I.R.C. §§ 6700, 6701, 6694, or 6695 by promoting abusive tax schemes and preparing abusive tax returns[6]. The IRS requested, among other things, Scambos's books, records, promotional materials, and clients' tax returns because this information will help "throw light upon" the issue of whether Scambos promoted abusive tax schemes or prepared abusive tax returns; thus, it is clear that the requested information may be relevant to their investigation. *See United States v. Arthur Young & Co.*, 465 US. 805, 814-15 (1984). The IRS did not already have the requested items in their possession at the time it issued their summons, and it followed the required procedures to issue and serve the summons[7]. Accordingly,

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[6] Specifically, the IRS is investigating whether Scambos wrote. published, or sold books that aid and abet potential customers to commit tax evasion and cease filing tax returns. It is also investigating whether Scambos used offshore trust schemes to evade federal income taxes or used private banking systems to hide assets, income, and identities from the IRS.

[7] Scambos argues, among other things, that the IRS summons violated 26 U.S.C. § 7609(d)(1) and (d)(2) because it did not provide twenty-three days to respond before his appearance was required and the required date to appear was less than twenty days after the summons was served. Scambos misreads §§ 7609(d)(1) and (d)(2), however, as neither § 7609(d)(l) or § 7609(d)(2) set forth any such restrictions. Instead, §§ 7609(d)(l) and (d)(2) prohibit premature examination of the records at issue and do not limit when the IRS may assume physical possession of the requested records or when the party may be ordered to appear. *See Conner*, 434 F.3d at 683 (finding argument that § 7609(d)(1) prohibits physical acceptance of records before the close of the 23rd day after the notice is received to be without merit). Scambos also argues that the summons is defective because it was not served by a Criminal Investigator of the Intelligence Division as required by 26 U.S.C. § 7608(b). Scambos again misreads the statute as Section 7608 operates independently of § 7602 and does not apply in this matter given that this is a civil, not criminal, investigation. See, e.g., *Nelson v. United Slates*, No. 94-1345, 1994 WL 519485, at *5 (N.D. Cal. Sept. 19, 1994) (explaining that limits set forth in § 7608(b) do not apply in civil

the Court finds that the IRS has established its prima facie case in support of enforcement. The Court also finds that Scambos is unable to rebut the prima facie case because he relies on frivolous arguments regarding the legality of the federal income tax laws or misreads the relevant statutes in attempting to show why the summons should not be enforced. As a result, the Court will grant the IRS's petition to enforce the summons. Last, Scambos belatedly argues that enforcement of the IRS summons violates his Fifth Amendment right against self-incrimination. Scambos did not raise this objection in his initial objections filed on November 19, 2007, but instead raised this argument in his January 22,2008 memorandum in arguing that Powell was misapplied and that the requested materials should be considered "poisonous fruit." The Court has already addressed Scambos's argument regarding Powell and has denied his objections as to its application. As to his Fifth Amendment argument, a taxpayer cannot assert a blanket claim of privilege under the Fifth Amendment as a valid basis not to comply with an IRS summons. *See,* e.g., *United States v. Schmidt*, 8 16 F.2d 1477, 1481 (10th Cir. 1987) (holding that a taxpayer cannot invoke the Fifih Amendment bar against self-incrimination unless he can "demonstrate that [he has] a 'reasonable cause to apprehend danger' upon giving a responsive answer that 'would support a conviction,' or 'would furnish a link in the chain of evidence needed to prosecute'" him for a criminal act (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Instead, the taxpayer must establish factually the "substantial and real" risk of incrimination resulting from his compelled testimonial communication or from his production of documents by asserting the privilege with specificity.[8] Id. (quoting *Marchetti v. United States*, 390 U.S.

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investigations, only criminal).

[8] The fact that Scambos prepared the documents is insufficient to trigger the Fifth Amendment privilege; rather, it is the act of producing the documents themselves that is considered testimonial,

39, 53 (1968)); *N. River Ins. Co. v. Stefanou*, 831 F.2d 484,487 (4th Cir. 1987). The taxpayer cannot avoid answering questions "merely because he declares that in so doing he would incriminate himself-his say-so does not itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486.

Scambos has failed to assert the Fifth Amendment privilege with sufficient particularity for this Court to make an informed ruling on the claim. *N. River Ins. Co.*, 83 1 F.2d at 487. Moreover, Scambos has already turned over the requested documents to the IRS on September 4, 2007. Thus, Scambos has effectively waived his Fifth Amendment privilege against self-incrimination as to those documents that he provided to the IRS without specifically invoking the privilege[9]. *Glorzbach v. Klavans*, 196 F. Supp. 685, 687-88 (E.D. Va. 1961) (holding that taxpayer who voluntarily provided documents to IRS had waived his Fifth Amendment privilege and could not invoke it after the records had been examined). If Scambos did invoke the privilege as to any of the requested documents, the Court will review, if necessary, his purported reasons for the privilege *in camera* to ascertain whether he has established a "substantial and real" risk of incrimination resulting

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thereby warranting possible Fifth Amendment protection. *Fisher v. United States*, 425 U.S. 391, 410 & n. 11 (1976).

[9] Scambos noted at the conclusion of the show cause hearing held on August 23, 2007, that he intended to invoke the Fifth Amendment privilege on a question by question basis, but he did not state his reasons for invoking the privilege. The briefs indicate that Scambos did invoke the privilege multiple times with regards to specific questions during the IRS interview held on September 4, 2007. The Court therefore finds that Scambos waived his Fifth Amendment privilege as to any questions that he answered or documents he provided the IRS without invoking the privilege. *Rogers v United States*, 340 U.S. 367, 371 (1951) (noting that the Fifth Amendment privilege against self-incrimination "is deemed waived unless invoked")

from the act of producing the requested documents. *United States* v. *Sharp*, 920 F.2d 1167, 1170-71 (4th Cir. 1990) (holding that district court must determine if there is sufficient hazard of incrimination to invoke Fifth Amendment privilege by determining whether the requested information is incriminating in nature and if so, whether criminal prosecution is sufficiently possible to trigger the need for constitutional protection).

IV. CONCLUSION

For the reasons stated herein, the Court finds that the IRS has satisfied the four requirements set forth in *United States* v. *Powell* to establish *a prima facie* case for enforcement. The Court also finds that Respondent has failed to rebut the *prima facie* case because of his frivolous arguments regarding the constitutionality and legality of the federal income tax laws. The Court further finds that Respondent did not invoke his Fifth Amendment right against self-incrimination and, therefore, has waived this right with respect to any documents that he has already provided the IRS. Accordingly, the Court hereby ADOPTS the Report and Recommendation of the Magistrate Judge, DENIES all objections by Respondent, and GRANTS the petition to enforce the summons. Further, the Court hereby DENIES Respondent's request to return his books and materials or to preclude the IRS from using this information in its investigation as he has failed to show that the books and materials were obtained improperly.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

Entered this 19th day of August, 2008

NORMAN K MOON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

United States of America
Plaintiff,

v.

Thomas T. Scambos, Jr.
Defendant,

Civil Action No. 3:07mc00011

AMENDED ORDER[1]

Judge Norman K. Moon

This matter is before the Court on Defendant's Notice of Appeal (docket entry 16) and Motion to Amend the Transcript of the Hearing (docket entry 17). Defendant appeals the Magistrate Judge's Order directing him to produce records and provide testimony to the Internal Revenue Service ("IRS"). In addition, Defendant asks this Court to amend the transcript of the Magistrate Judge's August 23, 2007 hearing to correct perceived inaccuracies. For the reasons stated below, Defendant's request to amend the transcript is DENIED and Defendant is ORDERED to file specific, written objections to the Magistrate Judge's August 23, 2007 Order within ten days of receipt of this order. I referred this case to the Magistrate Judge to determine a just resolution to the Government's petition to enforce the IRS summons. However, the Internal Revenue Code restricts the power to enforce a summons to the district courts. I.R.C. 4202(b); see also *U.S. v. First Nat'l Bank of Atlanta*, 628 F.2d 871, 873 (5th Cir. 1980). Therefore, I shall construe the

[1] This Amended Order amends and supersedes the Court's November 6,2007 Order.

Magistrate Judge's August 23, 2007 Order as proposed findings of fact and a proposed disposition. 28 U.S.C. § 636(b)(1); *see* also *First Nat '1 Bank of Atlanta*, 628 F.2d at 873.

Defendant filed a notice of appeal on October 11, 2007. Having construed the August 23, 2007 Order as proposed findings of fact and a proposed disposition, I shall also construe the Defendant's notice of appeal as objections to the Magistrate Judge's report and recommendation. Federal Rule of Civil Procedure 72 permits a party to object to the Magistrate Judge's recommended disposition of a matter within ten days of its receipt. Fed. R. Civ. P. 72. If a party chooses to object, it must file specific, written objections to the proposed findings and recommendations. Fed. R. Civ. P. 72. Otherwise, the failure to file such objections will waive its right to appeal in the matter. *Wells v. Shriners Hosp.*, 109 F.3d 198, 200-01 (4th Cir. 1997).

If a party is unrepresented by counsel, however, it must first be given explicit notice of the consequences of the failure to object before it will be barred from filing an appeal. *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985). The defendant in this case is unrepresented by counsel, but did not receive such notice. Therefore, the Court shall entertain any specific, written objections filed by the Defendant within ten days of receipt of this Order.

Defendant also requests this Court to conduct a hearing to correct inaccuracies in the transcript of the August 23, 2007 hearing. Defendant avers that several prejudicial statements made by the Magistrate Judge were omitted from the official transcription of the hearing and asks that all parties present at the August 23, 2007 hearing testify as to the missing portions of the transcript[2]. Despite

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[2] According to Defendant, the Magistrate Judge stated, prior to his

Defendant's allegation, a transcript certified by the court report is "deemed prima facie a correct statement of the testimony taken and the proceedings had." 28 U.S.C. § 753(b). The assertion of error alone is insufficient to overcome the statutory presumption that the transcript is correct. *United States v. Zammiello*, 432 F.2d 72, 73 (9th Cir. 1970); see also *United States v. Hill*, 78 Fed, Appx. 223, 225 (4th Cir.2003).

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to both parties.

ENTERED

United States District Judge

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ruling, "I don't understand anything at all that you have said. I don't understand a single argument that you have made in the courtroom."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

United States of America
Plaintiff,

v.

Thomas T. Scambos, Jr.
Defendant,

Civil No. 3:07mc00011

ORDER

Judge Norman K. Moon

This matter is before the Court on Defendant's Notice of Appeal (docket entry 16) and Motion to Amend the Transcript of the Hearing (docket entry 17). Defendant appeals the Magistrate Judge's Order directing him to produce records and provide testimony to the Internal Revenue Service ("IRS"). In addition, Defendant asks this Court to amend the transcript of the Magistrate Judge's August 23,2007 hearing to correct perceived inaccuracies. For the reasons stated below, Defendant's request is DENIED as MOOT.

I referred this case to the Magistrate Judge to determine a just resolution to the Government's petition to enforce the IRS summons. However, the Internal Revenue Code restricts the power to enforce a summons to the district courts. I.R.C. *5* 4202(b); see *also* U.S. *v. First Nat'1 Bunk of Atlanta, 628* F.2d 871, 873 (5th Cir.1980). Therefore, I shall construe the Magistrate Judge's August 23, 2007 Order as proposed findings of fact and a proposed disposition. 28 U.S.C.§ 636(b)(1); see *also First Nat'1 Bank of Atlanta,* 628 F.2d at 873.

Defendant filed a notice of appeal on October 11, 2007. This notice, whether filed pursuant to Federal Rule of Civil

Procedure 72(b)[1] or Federal Rule of Appellate Procedure 4[2], is untimely. Accordingly, I adopt the Magistrate Judge's proposed disposition in its entirety. Defendant's Notice of Appeal is hereby DISMISSED as untimely.

Defendant also requests this Court to conduct a hearing to correct inaccuracies in the transcript of the August 23, 2007 hearing. Defendant avers that several prejudicial statements made by the Magistrate Judge were omitted from the official transcription of the hearing and asks that all parties present at the August 23, 2007 hearing testify as to the missing portions of the transcript[3]. Despite Defendant's allegation, a transcript certified by the court report is "deemed prima facie a correct statement of the testimony taken and the proceedings had." 28 U.S.C. § 753(b). The assertion of error alone is insufficient to overcome the statutory presumption that the transcript is correct. *United States* v. *Zammiello,* 432 F.2d 72,73 (9th Cir. 1970); *see also United States* v. *Hill,* 78 Fed. Appx. 223, 225 (4th Cir. 2003).

Even if Defendant is correct, the alleged inaccuracies would have no bearing in this matter. Defendant has already complied with the Magistrate Judge's Order by appearing before the IRS on September 4, 2007. Therefore, this matter is moot. *See Powell v. McCormack,* 395 U.S.

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[1] Federal Rule of Civil Procedure 72(b) provides that a party may file specific, written objections to the proposed disposition of a matter within ten days of its receipt. Fed. R. Civ. P. 72(b).

[2] Federal Rules of Appellate Procedure 4 requires any notice of appeal to be "filed with the district clerk within 30 days after the judgment or order appealed from is entered" Fed R App P. 4(a)(l)(A).

[3] According to Defendant, the Magistrate Judge stated, prior to his ruling, "I don't understand anything at all that you have said. I don't understand a single argument that you have made in the courtroom."

486, 496 (1969) ("[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."). As such, this Court does not have jurisdiction. *See Preiser v. Newkirk, 422 U.S.* 395, 401 (1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. . . . [A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1 937)). Accordingly, Defendant's Motion to Amend the Transcript is DENIED as MOOT.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to both parties.

ENTERED:

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

United States of America
Plaintiff,

v.

Thomas T. Scambos, Jr.
Defendant,

CASE NO. 3:07mc00011

ORDER

By. B. Waugh Crigler
U.S. Magistrate Judge

Before the court is the United States' Petition to Enforce Internal Revenue Service ("IRS") Summons and response filed by Thomas T. Scambos, Jr. ("Scambos") which the court treats as a motion to quash. In consequence of a hearing on August 23, 2007 in which the respondent was afforded an opportunity to show cause why he should not be compelled to comply with the Summons, and the court finding that the government has established a *prima facie* case for enforcement of the summons pursuant to the factors of *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964) which Scambos failed to rebut, it is

ORDERED

as follows:

1) The Petition to Enforce hereby is GRANTED and Scambos' motion to quash hereby is DENIED;

2) Thomas T. Scambos, Jr. hereby is DIRECTED to comply fully with the summons as issued by Internal Revenue Services on April 26, 2007.

3) Scambos hereby is DIRECTED to appear on the 4'" day of September, 2007, at 10:00 a.m. in the offices of the IRS at 401 East Market Street (Enterprise Building), Charlottesville, Virginia, where he MUST PRODUCE all records required by the summons issued by Internal Revenue Services on April 26, 2007, and GIVE TESTIMONY before Revenue Agent Gayle Hunter as summonsed. **RESPONDENT IS WARNED THAT HIS FAILURE TO APPEAR AND COMPLY WITH THE SUMMONS TO PROVIDE BOTH RECORDS AND TESTIMONY AS DIRECTED BY THIS COURT WILL BE TREATED AS CONTEMPT OF COURT AND MAY LEAD TO THE IMPOSITION OF CIVIL PENALTIES, HIS ARREST AND DETENTION UNTIL HE COMPLIES OR IS PURGED OF CONTEMPT.**

The Clerk of the Court is hereby directed to send a certified copy of this Order to Thomas T. Scambos, Jr.; and to all counsel of record.

ENTERED:

Magistrate Judge